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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-797-2

Filed: 1 August 2017

Forsyth County, No. 14 CVS 5603

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the C-BASS MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-RP2, Plaintiff,

v.

WILLIE LEE PINKNEY, CLARA PINKNEY, SIDDCO, INC., POORE SUBSTITUTE TRUSTEE, LTD, Defendants.

Appeal by plaintiff from order entered 5 March 2015 by Judge Patrice A. Hinnant in Forsyth County Superior Court. Heard originally in the Court of Appeals 1 December 2015, with opinion filed 10 May 2016. An opinion reversing the decision of the Court of Appeals and remanding for consideration of plaintiff's remaining issue on appeal was filed by the Supreme Court of North Carolina on 9 June 2017.

Bradley Arant Boult Cummings LLP, by Brian M. Rowson, for plaintiff-appellant.

The Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for defendant-appellees Willie Lee Pinkney and Clara Pinkney.

ARROWOOD, Judge.

U.S. BANK NAT'L ASS'N V. PINKNEY

Opinion of the Court

On remand from the Supreme Court of North Carolina to address an issue raised by plaintiff but not previously addressed by this Court, we include only those facts necessary to a resolution of the issue before us.¹

On 10 September 2014, U.S. Bank National Association, as Trustee for the C-BASS Mortgage Loan Asset-Backed Certificates, Series 2006-RP2 (“plaintiff”) filed a complaint against Willie Lee Pinkney, Clara Pinkney, Siddco, Inc., and Poore Substitute Trustee, LTD (collectively “defendants”). Plaintiff alleged that on or about 12 December 1997, Willie Lee Pinkney and Clara Pinkney (“the Pinkneys”) executed a promissory note with Ford Consumer Finance Company, Inc. (the “Note”) in the principal amount of \$257,256.89 to purchase real property situated in Forsyth County. The Note was secured by a deed of trust (“Subject Deed of Trust”) on the underlying property.

Plaintiff further alleged that the Pinkneys had defaulted under the terms of the Note for failure to make payments as required, had received written notice of default, but had refused to make payments required by the Note. Plaintiff contended that the total outstanding principal balance of the Note was \$268,171.13 plus “past due interest” in the amount of \$118,055.05. Plaintiff advanced the following claims for relief: priority of interest; judicial foreclosure; and judgment on the Note. Plaintiff

¹ A more comprehensive factual background can be found in *U.S. Bank Nat'l Ass'n v. Pinkney*, __ N.C. App. __, 787 S.E.2d 464, 2016 N.C. App. LEXIS 522, 2016 WL 2647709 (May 2016) (unpub.), *rev'd and remanded*, __ N.C. __, __ S.E.2d __ (June 9, 2017) (No. 229PA16).

Opinion of the Court

alleged that it was the present holder of the Note and Subject Deed of Trust and the party entitled to foreclose the subject property.

On 6 November 2014, the Pinkneys moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Pinkneys presented two bases for its motion: (1) because plaintiff was "not the original payee, the lack of indorsement from the predecessor in the chain of title is fatal to the Plaintiff's claim of being holder entitled to enforce the instrument[]" and (2) because plaintiff failed to make an allegation that a payment had been made within the three years preceding the filing of its complaint, plaintiff's claims were time barred by the applicable statute of limitations. On 5 March 2015, the trial court entered an order, granting the Pinkney's motion to dismiss and dismissing plaintiff's action with prejudice.

On appeal by plaintiff, our Court affirmed the trial court's dismissal order on the ground that plaintiff could not establish that it was the holder of the Note. *U.S. Bank Nat'l Ass'n v. Pinkney*, __ N.C. App. __, 787 S.E.2d 464, 2016 N.C. App. LEXIS 522, 2016 WL 2647709 (May 2016) (unpub.). The Supreme Court of North Carolina reversed the Court of Appeals, holding that plaintiff adequately pled its claim for judicial foreclosure, and remanded this case to our Court for consideration of plaintiff's remaining issue on appeal. *U.S. Bank Nat'l Ass'n v. Pinkney*, __ N.C. __, __ S.E.2d __ (June 9, 2017) (No. 229PA16).

Opinion of the Court

Plaintiff's remaining argument on appeal is that the trial court erred in granting the Pinkney's Rule 12(b)(6) motion to dismiss based upon the statute of limitations. In their brief, defendants "concede that the statute of limitations issue cannot be reached in a 12(b)(6) posture[]" and do not contest plaintiff's argument.

Although the trial court did not reveal the basis upon which it granted the Pinkney's Rule 12(b)(6) motion, it is well established that "[a] statute of limitation . . . may be the basis of a 12(b)(6) dismissal [only] if on its face the complaint reveals the claim is barred." *Forsyth Memorial Hosp. v. Armstrong World Indus.*, 336 N.C. 438, 442, 444 S.E.2d 423, 426 (1994).

[D]ismissal of an action on the pleadings based on a plea in bar of the statute of limitations is proper only when all the facts necessary to establish the plea in bar . . . are either alleged or admitted in the plaintiff's pleadings, construing plaintiff's pleadings liberally in favor of the plaintiff.

Fox v. Sara Lee Corp., 210 N.C. App. 706, 708-709, 709 S.E.2d 496, 498 (2011) (citing *Russell v. Adams*, 125 N.C. App. 637, 641, 482 S.E.2d 30, 33 (1997)) (internal quotation marks omitted).

Here, plaintiff alleged in its complaint that the Pinkneys had defaulted for failure to make payments pursuant to the terms of the Note and that they continued to refuse to make payments as required. The complaint did not, however, divulge the dates on which the Pinkneys made or failed to make any payments, making it impossible to determine when the statute of limitations was triggered. *See Marzec v.*

U.S. BANK NAT'L ASS'N V. PINKNEY

Opinion of the Court

Nye, 203 N.C. App. 88, 96, 690 S.E.2d 537, 543 (2010) (reversing a trial court's dismissal of the plaintiff's conversion claim pursuant to Rule 12(b)(6) "[s]ince the complaint . . . does not allege when [the defendant] made the payments on the loan (the act exercising dominion over the funds), we again cannot determine from the allegations of the complaint that the conversion claim is barred by the statute of limitations"). Because the face of the complaint does not contain allegations establishing that plaintiff's claims are barred by the statute of limitations, the statute of limitations defense is not properly within the trial court's scope of review on this Rule 12(b)(6) motion to dismiss. Accordingly, the trial court's dismissal of plaintiff's claims are reversed.

REVERSED.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).